

BEFORE THE FISH, WILDLIFE AND PARKS COMMISSION
OF THE STATE OF MONTANA

In the matter of the adoption of NEW)	NOTICE OF PROPOSED ADOPTION
RULES I through III and amendment of)	AND AMENDMENT
ARM 12.11.6601, 12.11.6603, and)	
12.11.6605 regarding emergency)	NO PUBLIC HEARING
closures of department lands and)	CONTEMPLATED
public waters)	

TO: All Concerned Persons

1. On September 24, 2009, the Fish, Wildlife and Parks Commission (commission) proposes to adopt and amend the above-stated rules.

2. The commission will make reasonable accommodations for persons with disabilities who wish to participate in the rulemaking process or need an alternative accessible format of this notice. If you require an accommodation, please contact the commission no later than August 21, 2009, to advise us of the nature of the accommodation that you need. Please contact Stella Cureton, Fish, Wildlife and Parks, P.O. Box 200701, Helena, MT 59620-0701; telephone (406) 444-4594; fax (406) 444-7456; e-mail scureton@mt.gov.

3. The rules as proposed to be adopted provide as follows:

NEW RULE I DEPARTMENT'S AUTHORITY TO CLOSE DESIGNATED RECREATION AREAS DUE TO EMERGENCY (1) The commission authorizes the department to adopt temporary emergency rules to close designated recreation areas to public use as provided in NEW RULE II.

(2) Public use of the designated recreation area means any public occupation of the land.

(3) The commission authorizes the department to reopen designated recreation areas closed by temporary emergency rule as provided in NEW RULE II.

AUTH: 23-1-106, 87-1-303, MCA

IMP: 2-4-303, 23-1-106, 87-1-303, MCA

NEW RULE II EMERGENCY DESIGNATED RECREATION AREA CLOSURE CRITERIA (1) The department may, pursuant to NEW RULE I, adopt temporary emergency rules under the following criteria.

(a) The department receives written request for closure of designated recreation area from the interagency fire management team or similar authority that provides the description of where to implement the fire closure.

(b) The department determines that firefighting efforts on or near the designated recreation area creates imminent peril to the public health, safety, or welfare.

(c) The department determines that dangerous conditions exist on or near

the designated recreation area that creates imminent peril to public health, safety, or welfare.

(2) The department may reopen the designated recreation area by repealing a temporary emergency rule when it determines that firefighting efforts or dangerous conditions on or near the area have subsided to the extent that imminent peril to the public health, safety, and welfare no longer exists.

AUTH: 23-1-106, 87-1-303, MCA

IMP: 2-4-303, 23-1-106, 87-1-303, MCA

NEW RULE III NOTIFICATION OF EMERGENCY DESIGNATED RECREATION CLOSURE AREAS (1) Prior to or simultaneously with the effective date of the closure the department shall:

- (a) notify the commission;
- (b) post notice of the closure on the agency web site;
- (c) post notice of the closure within and near the affected area; and
- (d) send press releases regarding the closure to newspapers and media outlets having general distribution in the affected area.

AUTH: 23-1-106, 87-1-303, MCA

IMP: 2-4-303, 23-1-106, 87-1-303, MCA

REASONABLE NECESSITY: Title 87 of the Montana Code Annotated (MCA) generally governs the powers, duties, and activities of the Department of Fish, Wildlife and Parks, and the Fish, Wildlife and Parks Commission. 87-1-301(1)(c), MCA makes clear that the commission "shall establish the rules of the department governing the use of lands owned or controlled by the department and waters under the jurisdiction of the department." However, Part I of Title 23, which governs the conservation and management of state parks provides: "The department may make rules governing the use, occupancy, and protection of the lands and property under its control." 23-1-106(1), MCA. Thus, there is parallel authority in the law authorizing the department to make rules governing its own land vis-à-vis that of the commission. Administrative rules have been promulgated under Title 23, MCA that regulate the use of all lands under the control, administration, and jurisdiction of the department. Such areas are labeled "designated recreation areas." The commission, in recognition of the overlapping or parallel authority, proposes new rules that mirrors the language of the water closure rules for the use of land owned or controlled by the department and clarifies the department's authority to close designated recreation areas in the event of an emergency that poses an immediate threat to public health, safety, or welfare.

4. The rules proposed to be amended provide as follows, stricken matter interlined, new matter underlined:

12.11.6601 DEPARTMENT'S AUTHORITY TO CLOSE PUBLIC WATERS DUE TO FIRE EMERGENCY (1) The commission authorizes the department to adopt temporary emergency rules to close public waters to public use as provided in

ARM 12.11.6603.

(2) Public use of the water means boating, floating, swimming, fishing, and any other public occupation of the waters.

(3) The commission authorizes the department to reopen public waters closed by temporary emergency rule as provided in ARM 12.11.6603.

AUTH: 87-1-303, MCA

IMP: 2-4-303, 87-1-303, MCA

12.11.6603 FIRE EMERGENCY PUBLIC WATER CLOSURE CRITERIA (1)

The department may, pursuant to ARM 12.11.6601, adopt temporary emergency rules under the following criteria.

(a) The department receives written request for closure of public waters from the interagency fire management team or similar authority that provides the description of where to implement the fire closure.

(b) The department determines that firefighting efforts on or near the water creates imminent peril to the public health, safety, or welfare.

(c) The department determines that dangerous conditions exist on or near the water that creates imminent peril to public health, safety, or welfare.

(2) The department may reopen the waters by repealing a temporary emergency rule when it determines that firefighting efforts or dangerous conditions on or near the water have subsided to the extent that imminent peril to the public health, safety, and welfare no longer exists.

AUTH: 87-1-303, MCA

IMP: 2-4-303, 87-1-303, MCA

12.11.6605 NOTIFICATION OF FIRE EMERGENCY PUBLIC WATER CLOSURE AREAS (1) Prior to or simultaneously with the effective date of the ~~fire~~ closure the department shall:

- (a) notify the commission;
- (b) post notice of the ~~fire~~ closure on the agency web site;
- (c) post notice of the ~~fire~~ closure within and near the affected area; and
- (d) send press releases regarding the ~~fire~~ closure to newspapers and media outlets having general distribution in the affected watershed or water body.

AUTH: 87-1-303, MCA

IMP: 2-4-303, 87-1-303, MCA

REASONABLE NECESSITY: In 2008, the commission adopted rules to address closures of water to public use due to fire emergency. In the past year emergency water closures have been adopted due to other environmental dangers that posed imminent peril to the public health, safety, and welfare. On March 27, 2008, the commission adopted an emergency rule to close a portion of the Smith River due to an ice jam that caused the river to be impassable to recreationists. On June 20, 2008, the commission adopted an emergency rule to close a portion of the Yellowstone River due to a bridge being in danger of collapsing. On May 27, 2009

the commission adopted two temporary emergency rules. A portion of Belt Creek was closed due to a log jam that caused the river to be impassable and Vigilante Kids' Fishing Pond and picnic area was closed due to a dam upstream of the pond is in a state of imminent failure.

The commission recognizes that under certain circumstances, there is an immediate need to adopt temporary emergency rules that allow the department to consider environmental factors other than fires. Presently, in order to close public water for reasons other than fire a quorum of commissioners must adopt the emergency closure. The commission's concern is that, during an emergency, the department may not be able to contact a quorum of commissioners. Adoption of an emergency rule would be delayed until enough commissioners could be contacted. If this circumstance occurred the public could be endangered. Since it is unlikely that the commission would refuse to adopt a temporary emergency rule when the public health, safety, and welfare is jeopardized, the commission believes it is logical and necessary to delegate its authority to the Director of the Department of Fish, Wildlife and Parks to adopt emergency rules closing public waters when environmental dangers exist.

5. Concerned persons may submit their data, views, or arguments concerning the proposed actions in writing to: Jessica Fitzpatrick, Department of Fish, Wildlife and Parks, P.O. Box 200701, Helena, Montana, 59620-0701; fax (406) 444-7456; or e-mail jfitzpatrick@mt.gov, and must be received no later than August 28, 2009.

6. If persons who are directly affected by the proposed actions wish to express their data, views, or arguments orally or in writing at a public hearing, they must make written request for a hearing and submit this request along with any written comments they have to Jessica Fitzpatrick at the above address. A written request for a hearing must be received no later than August 28, 2009.

7. If the commission receives requests for a public hearing on the proposed actions from either 10% or 25, whichever is less, of the persons who are directly affected by the proposed action; from the appropriate administrative rule review committee of the Legislature; from a governmental subdivision or agency; or from an association having not less than 25 members who will be directly affected, a hearing will be held at a later date. Notice of the hearing will be published in the Montana Administrative Register. Ten percent of those persons directly affected has been determined to be greater than 25 people based on the fact that every Montana citizen has access to public waters that could be closed in a fire emergency.

8. The Department of Fish, Wildlife and Parks maintains a list of interested persons who wish to receive notice of rulemaking actions proposed by the commission or department. Persons who wish to have their name added to the list shall make written request, which includes the name and mailing address of the person to receive the notice and specifies the subject or subjects about which the person wishes to receive notice. Such written request may be mailed or delivered to

Fish, Wildlife and Parks, Legal Unit, P.O. Box 200701, 1420 East Sixth Avenue, Helena, MT 59620-0701, faxed to the office at (406) 444-7456, or may be made by completing the request form at any rules hearing held by the commission or department.

9. The bill sponsor contact requirements of 2-4-302, MCA, do not apply.

/s/ Shane Colton

Shane Colton, Chairman

Fish, Wildlife and Parks Commission

/s/ William A. Schenk

William A. Schenk

Rule Reviewer

Certified to the Secretary of State July 20, 2009.